BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of		
	)	MM Docket No. 99-360
Public Interest Obligations	)	
of TV Broadcast Licensees	)	

To: The Commission

JOINT COMMENTS OF THE NAMED STATE BROADCASTERS ASSOCIATIONS

Arizona Broadcasters Association, California Broadcasters Association, Connecticut Broadcasters Association, Idaho State Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Maine Association of Broadcasters, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Missouri Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, South Carolina Broadcasters Association, Texas Association of Broadcasters, Utah Broadcasters Association, and Washington State Association of Broadcasters (collectively, the "State Associations"), by their attorneys and pursuant to Sections 1.415 and 1.430 of the Commission's rules, hereby submit their joint comments in response to the *Notice of Inquiry*, released December 20, 1999, in the above-captioned matter in which the Commission seeks comment on how the public interest obligations of television broadcasters should be defined in the digital environment.

Introduction

As organizations chartered to help create and maintain a regulatory and economic environment conducive to the growth of the free, over-the-air, locally based, full service television and radio broadcast industries in their respective states, the State Associations each have a direct interest in the instant proceeding. The State Associations urge the Commission to concentrate on narrowly tailoring the existing public interest requirements to the digital environment rather than on imposing additional burdens on television broadcasters at the cusp of the transition to a nascent digital technology. Moreover, the State Associations recommend that the Commission apply the existing public interest obligations to digital broadcast service provided on the primary "channel" and impose, at most, limited obligations on services ancillary or supplementary to the primary broadcast service.

Discussion

Digital broadcasting is in its infancy. Some television stations have yet to convert to digital, and few have fully determined how they will utilize the technology -- whether to broadcast in high definition, multicast, datacast or provide some combination of these services. In these circumstances, the Commission should allow broadcasters to explore new and innovative ways of serving their communities, itself a public interest benefit, and should refrain from rushing in to immediately saddle the industry with cumbersome new requirements with few demonstrated benefits and high costs. Should the Commission impose such burdensome new requirements on digital operations, these requirements may well forestall technical innovation and slow the conversion to digital operations that the Commission has been trying so hard to promote.

Recognizing the appropriateness of providing licensees with flexibility to respond to audiences and to meet the continuously changing needs of their communities, the Commission eliminated in the 1980s guidelines regarding the desirable levels of nonentertainment programming and commercialization in broadcasts as well as ascertainment and program logging requirements.[1] Almost two decades later, the Notice appears to reflect a Commission that is apparently no longer confident of television broadcasters' ability to determine how best to serve their audiences absent detailed instructions. Thus, the Commission solicits comment on proposals to reregulate the industry by requiring broadcasters to, among other things, "set[] aside a minimum number of hours each week to provide educational programs or services, [including] data transmission for schools," *Notice* at 6, "transmit information on behalf of local schools, libraries, community-based organizations, governmental bodies, and public safety institutions" if they choose to implement datacasting, *Notice* at 7, "disclose their public interest programming and activities on a quarterly basis, matched against ascertained community needs" determined either by "reaching out to ordinary citizens and local leaders and . . . through postal and electronic mail services as well as broadcast announcements" or by "using standardized check-off forms that reduce administrative burdens and can be easily understood by the public," *Notice* at 8, make enhanced disclosures regarding nonentertainment and children's programming including, but not limited to "contributions to political discourse, public service announcements,

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[1] *See Deregulation of Radio*, 84 FCC2d 968, *recon. denied*, 87 FCC2d 797 (1981), *aff'd in part and remanded in part sub nom. Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983), *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC2d 1075 (1984), *recon. denied*, 104 FCC2d 358 (1986), *aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987) (hereinafter, "*Television Deregulation*").

children's and educational programming, local programming, programming that meets the needs of underserved communities, and community-specific activities," *Notice* at 8, abide by a set of mandatory minimum public interest requirements adopted by the Commission, *Notice* at 10, provide closed captioning and description services for the blind of PSAs, public affairs programming, and political programming, *Notice* at 11, and donate free air time to political candidates, *Notice* at 16-17. The relationship between these recommendations and the transition to digital is remote at best.

The Commission should hesitate to impose (or, in some cases, reimpose) these intrusive and burdensome regulations on the new and rapidly developing digital technology. Instead, the Commission should focus its energies on adapting the existing public interest requirements, which have proven generally effective in the analog environment, to digital broadcasts only on a station's primary "channel." Such broadcasts are more apt to resemble the prior analog broadcasts and, thus, to pose fewer problems in adapting the existing public interest obligations. On the other hand, the types of services to be offered as ancillary or supplementary to the main digital broadcast service cannot be as readily foreseen. Some broadcasters may choose to provide programming narrowly targeted to a specific segment of the community or programming ancillary to that provided on the primary "channel," such as alternate views of the field or close-ups of various players during a baseball game on the primary "channel," or a program channel devoted to a unique market niche. Other broadcasters may choose to offer nonprogram services such as paging. Even hybrid services, such as wireless internet access that may contain the transmission of streaming video programs, may be offered on the digital spectrum. The possibilities are virtually endless. Imposition of broad public interest requirements on these new services would stifle innovation and likely slow the transition to digital. In fact, to burden such

new services with children's programming, political broadcasting, and other far-ranging requirements would inhibit the introduction and development of these services and is patently contrary to the public interest.[2]

Practically speaking, the imposition of such requirements simply does not make sense in some instances, and would be absurdly hard to enforce in others. For instance, if a broadcaster chooses to narrowcast business news on a subchannel, how would three hours of children's programming be made to fit into such a format? Or if part of the channel were used for wireless internet access, would all internet programmers providing video streaming anywhere in the world be subject to children's programming rules simply because their video programming might be delivered over a DTV signal as opposed to a DSL telephone line? Already, the internet community is suspicious of the possibility of Commission programming restrictions, and the adoption of new rules as proposed in the inquiry could validate such suspicions.

Digital technology should be allowed to evolve and broadcasters to develop the services that consumers demand. As the Commission has previously recognized, "marketplace solutions can be consistent with public interest concerns."[3] At this stage, it is impossible to identify and document market failures that should be remedied through regulation. There is simply no need

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[2]In deregulating radio, the Commission based its decision, in part, on the narrowcast nature of most radio markets. Similarly, in its Report and Order deregulating television, the Commission observed that "[t]o the extent that the video marketplace might evolve in the direction of a narrowcasting model, we believe our conclusion in the radio deregulation proceeding that adequate market incentives exist under such conditions to ensure appropriate levels of these types of [nonentertainment] programming is directly applicable here." *Television Deregulation*, 98 FCC2d at 1086 n.34.

[3]*Deregulation of Radio*, 84 FCC2d at 974, *see also Television Deregulation*, 98 FCC2d at 1114 ("We feel confident that existing and future marketplace forces will ensure the presentation of programming that addresses significant issues in the community.")

to prematurely impose costly restrictions that inhibit technological development and innovation based on the mere possibility that at some future date a problem may develop.[4] As the Commission itself has acknowledged, "[a] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."[5]

Section 336 of the Communications Act of 1934, as amended, does not require otherwise. This section of the Act was adopted as part of the Telecommunications Act of 1996, an act specifically intended to promote competition and to deregulate the communications industries. The section, titled "Broadcast Spectrum Flexibility," was primarily intended to give broadcasters the flexibility to use digital spectrum for services ancillary or supplemental to digital television service, provided such use was consistent with the technology or method designated by the Commission for the provision of digital service.[6] As such, the section mandates that the Commission permit digital broadcasters to offer such ancillary or supplementary services that are consistent with the public interest, requires the Commission to adopt regulations governing these services where necessary for the protection of the public interest, and, where broadcasters offer such ancillary or supplementary services, requires the Commission to ensure that all digital

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[4]To the extent that it can be *documented* that analog stations have failed to adequately serve the public interest in identified ways, the Commission should examine the situation carefully before acting on the presumption that such a situation will continue in the digital environment.

[5]*Elimination of Unnecessary Broadcast Regulation*, 54 RR2d 1043, 1047 (citing *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977)).

[6]*See* H.R. Rep. No. 204, 104th Cong., 2nd Sess. 116-17 (1995), H.R. Conf. Rep. No. 458, 104th Cong., 2nd Sess. 159-61 (1996), *see also* Telecommunications Competition and Deregulation Act of 1995, S. Rep. No. 23, 104th Cong., 1st Sess. 10-11 (1995), 141 Cong. Rec. S12,363, 12,365 (1995) (statement of Sen. Pressler).

program services are in the public interest.[7] None of these provisions, however, requires that the Commission return to outmoded, detailed micromanagement of all aspects of a broadcaster's programming decisions, an approach abandoned in the mid-eighties. The Commission should avoid adopting a host of new regulations not even remotely related to the switch to digital operations, nor should it impose such outmoded public interest obligations on program services ancillary to the main digital service or common carrier-type services such as paging or wireless internet access.[8]

Conclusion

A few weeks after passage of the Telecommunications Act of 1996, Senator Larry Pressler, the sponsor of the bill that was to become the Act, cautioned against interest groups' attempts to achieve through "regulatory revisionism" what they had failed to achieve through legislation. In addressing proposals before the Commission to require broadcasters to increase the amount of air time dedicated to public interest and children's programming, he noted that "[t]he [Telecommunications] act requires license simplification, not license complication. The FCC's direction in carrying out this [license renewal] provision seems to be headed in the direction of re-regulation instead of deregulation. It is the latter approach Congress clearly intended."[9] The State Associations urge the Commission to disprove this prediction and to adopt rules that are consistent with both the letter and the spirit of the statute.

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[7]*See* 47 U.S.C. § 336(a)(2), (b)(5), (d).

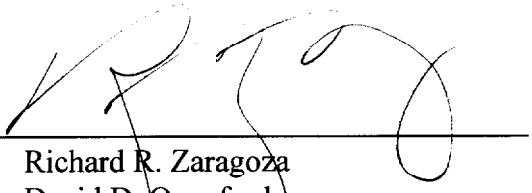
[8]In fact, the application of such obligations to services involving only the transmittal of information generated by others could subject broadcasters to liability for the content of the information transmitted.

[9]Senator Larry Pressler, *Telecom Reform: It Ain't Over 'Til It's Over*, 104 Cong. Rec. S2207 (1996), reprinted from Roll Call, March 11, 1996.

For the reasons set forth above, the State Associations respectfully request that the Commission narrowly tailor the existing public interest requirements to the digital broadcast service provided on the primary "channel" and impose, at most, limited public interest obligations on ancillary and supplemental services.

Respectfully submitted,

THE NAMED STATE BROADCASTERS ASSOCIATIONS

By 

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